surrender of the instrument with intent that it be cancelled,[9] will convert the mortgage into an absolute conveyance. *A fortiori*, an abandonment of his right of redemption by the mortgagor and an acceptance of a lease of the premises from the mortgagee has the same effect.[10] However, the relation between the mortgagor and the mortgagee is so far fiduciary that courts will carefully scrutinize such transactions[11] and the right of redemption will be regarded as extinguished only by an agreement founded on adequate consideration and free from suspicion of fraud.[12] The conversion of a mortgage into an absolute conveyance in this manner is not by way of transfer; for the mortgagee already has the legal fee. Nor is it strictly speaking a release. Some courts work it out on the theory of estoppel, through the surrender of the legal evidence of the mortgagor's claim,[13] but it seems sufficient to say that it would be inequitable to allow the mortgagor to redeem.[14] Nor does the rule contravene the Statute of Frauds.[15]

Through an unfortunate confusion of legal and equitable principles a small majority of American jurisdictions have abrogated the common law doctrine and hold that a mortgage does not pass the legal title to the mortgagee.[16] Of these so-called "lien states," Georgia, Iowa, Michigan, and Nebraska hold that where the defeasance agreement is not contained in the deed title does pass. In these states such mortgages should be convertible into absolute conveyances as in common law jurisdictions.[17] In New York, however, it was recently held that the physical destruction of the instrument of defeasance under a valid agreement that the mortgagee should have the absolute estate did not destroy the right of redemption. *Conover* v. *Palmer*, 60 N. Y. Misc. 241. Such a holding, though seemingly undesirable, is but the logical result of an illogical doctrine. If the title did not pass by the original deed it is difficult to see how it can do so later by parol agreement or by the destruction of a collateral instrument. The legal estate, being in the mortgagor can only be divested by foreclosure or by a conveyance executed according to statutory requirements.[18] However, some of the "lien states" have refused to be consistent,[19] and it is conceivable that in some circumstances the mortgagor should be estopped to deny the mortgagee's title.[20]

NECESSITY AS AN EXCUSE FOR A TRESPASS UPON LAND. — Since the earliest times there have been many well-recognized exceptions to the rule that any unauthorized entry upon the land of another is an actionable trespass. Hence the subjection to excusable entries must be regarded as one of the reasonable burdens of property ownership. The legal justifica-

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[9] Trull *v.* Skinner, 17 Pick. (Mass.) 213.
[10] Seymour *v.* Mackay, 126 Ill. 341; Jordan *v.* Katz, 89 Va. 628.
[11] See 21 HARV. L. REV. 459, 464. *Cf.* Villa *v.* Rodriguez, 12 Wall. (U. S.) 323.
[12] Cassem *v.* Heustis, 201 Ill. 208.
[13] See Trull *v.* Skinner, *supra*, 215. *Cf.* Commonwealth *v.* Dudley, 10 Mass. 402.
[14] West *v.* Reed, 55 Ill. 242.
[15] McMillan *v.* Jewett, 85 Ala. 476. *Contra*, Van Keuren *v.* McLaughlin, 19 N. J. Eq. 187.
[16] Barry *v.* Hamburg-Bremen Ins. Co., 110 N. Y. 1.
[17] Baxter *v.* Pritchard, 122 Iowa 590; Stall *v.* Jones, 47 Neb. 706. But see Thompson *v.* Mack, Harr. (Mich.) 150.
[18] Odell *v.* Montross, 68 N. Y. 499; Keller *v.* Kirby, 34 Tex. Civ. App. 404; Brinkman *v.* Jones, 44 Wisc. 498.
[19] Shubart *v.* Stanley, 52 Ind. 46, 51; Wilson *v.* Carpenter, 62 Ind. 495.
[20] See Odell *v.* Montross, *supra*. But see Howe *v.* Carpenter, 49 Wisc. 697.

tions for trespasses on land may be roughly divided into three groups: First, where the entry is excused on the ground of implied leave and license.[1] The second division comprises trespasses committed in the administration of justice.[2] The numerous other circumstances under which trespasses have been excused may be grouped under the head of necessity, public and private.

Justification on the ground of public necessity is based on the broad common law maxim that, in case of conflict, private rights must yield to public convenience and necessity. Thus, an entry on land for the defense of the realm has long since been held justifiable,[3] and in this country numerous decisions have exonerated interference with property in time of war.[4] Also, where the public safety is endangered a trespass is an excusable means of relief,[5] as, for instance, the destruction of property to prevent the spread of fire.[6] Another common illustration of this doctrine is the right of a traveller to pass through lands adjoining an impassable highway.[7]

Justification by private necessity is equally well founded in the common law, although here there is no basis of public convenience. The conflict is between the claims of two individuals, so that in each case the court must balance the interest of the land-owner against the needs of the trespasser. The doctrine would therefore seem to be merely an instance of the adoption by the common law of natural rights by necessity. In this the courts are naturally conservative and for its application require some such necessity as the preservation of life or property.[8] Thus neither the pursuit of game, even though of a dangerous nature,[9] nor the demand of charity or family affection [10] is a sufficient ground to excuse a trespass. On the other hand, it has always been the rule that an entry to save the goods of the landowner, and, in some circumstances, of a third person, from destruction by fire or water is not actionable,[11] and a man may go on land to recover cattle escaped from the highway.[12] The preservation of human life would surely seem to be sufficient necessity, and in the analogous case of trespass to personalty

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[1] Ditcham *v.* Bond, 3 Camp. 524; Martin *v.* Houghton, 45 Barb. (N. Y.) 258.

[2] Entry by officer to make an arrest or attachment. State *v.* Smith, 1 N. H. 346; Haggerty *v.* Wilber, 16 John. (N. Y.) 287. Closely allied are cases of entry by a private individual in the recaption of realty, Fort Dearborn Lodge *v.* Klein, 115 Ill. 177; see Low *v.* Elwell, 121 Mass. 309; or in the recaption of personalty, Patrick *v.* Colerick, 3 M. & W. 483; Madden *v.* Brown, 8 N. Y. App. Div. 454 (the theory of implied license suggested in these cases seems a fiction); or to abate a nuisance, Amoskeag Co. *v.* Goodale, 46 N. H. 53. See Brown *v.* Perkins, 12 Gray (Mass.) 89.

[3] 20 Vin. Abr., Trespass (B. a), pl. 4; Saltpetre Case, 12 Rep. 12.

[4] Respublica *v.* Sparhawk, 1 Dall. (U. S.) 357; United States *v.* Pacific R. R., 120 U. S. 227.

[5] Dewey *v.* White, M. & M. 56. See Seavey *v.* Preble, 64 Me. 120.

[6] Suocco *v.* Geary, 3 Cal. 69; Russell *v.* Mayor of N. Y., 2 Den. (N. Y.) 461. See Metallic Compression Casting Co. *v.* Fitchburg R. R. Co., 109 Mass. 277.

[7] Campbell *v.* Race, 7 Cush. (Mass.) 408; Morey *v.* Fitzgerald, 56 Vt. 487; Absor French, 2 Show. 29, where the adjoining landowner caused the obstruction. In the case of a private way deviation is excusable only when the owner of the servient tenement causes the obstruction. Haley *v.* Colcord, 59 N. H. 7; Taylor *v.* Whitehead, 2 Doug. 745.

[8] The necessity must arise independently of the fault of the trespasser. 6 Bacon, Abr., Trespass, 674; Anonymous, Y. B. 6 Ed. IV. 7, pl. 18. See Millen *v.* Fawdry, Latch. 119.

[9] Glenn *v.* Kays, 1 Ill. App. 479; Paul *v.* Summerhayes, 4 Q. B. D. 9.

[10] Parlet *v.* Bowman, 2 Rol. Abr. 567; Neilson *v.* Brown, 13 R. I. 651.

[11] 20 Vin. Abr., Trespass (H. a. 4), pl. 24; *ibid.* (K. a) pl. 3; Proctor *v.* Adams, 113 Mass. 376.

[12] Goodwin *v.* Cheveley, 4 H. & N. 631; Rightmire *v.* Shepard, 12 N. Y. Supp. 800.

it has been so held.[13] The admiralty doctrine of jettison seems based on this ground.[14] And the old books say that a man fleeing from attack may cross another's close with impunity.[15] A recent decision raises this question, it is believed, for the first time in this country. While sailing with his family the plaintiff was forced by a storm to moor to the defendant's dock to save his boat and the people in it from destruction. The defendant cast off the boat, with the result that it was wrecked and the plaintiff injured. The court, in overruling the defendant's demurrer, held that the plaintiff's trespass was excused by its necessity. *Ploof* v. *Putnam*, 71 Atl. 188 (Vt.). Stress of weather has been held sufficient necessity to justify a breach of the Embargo Act.[16] The decision therefore seems correct and in accord with authority. Whether, though the entry is excusable, an action at the suit of the landowner will lie for any damage done is a point upon which there is as yet no authority.[17]

MERGER OF ESTATES HELD IN DIFFERENT RIGHTS. — Merger is the process by which one estate is destroyed through union with another estate in the same land. For one estate to be thus "drowned" by another these conditions at least are admittedly essential: the two estates must come into the same ownership; the second must be the next vested estate in succession; and the second must in legal contemplation be at least as large as the first.[1] On the question whether to these requisites there must be added, as a fourth, that the two estates be held in the same right, there has been an extraordinary variety of opinion.[2]

In an early case it seems to have been suggested that the mere fact of the estates being in different rights could never prevent merger;[3] but this has never been followed,[4] and later discussion has been concerned with the conditions under which such estates could merge, if at all. Another early decision declared that a term in *autre droit* would merge in a reversion in proper right acquired by feoffment, but not in an estate passed by bargain and sale.[5] This distinction, however, has been overlooked in later cases and, it is submitted, not unfortunately. The foundation of merger is metaphysical — the medieval lawyer felt a logical incongruity in one man being lord and tenant of the same estate, or in an estate continuing its independent existence, when in the same hands as one in immediate succession that in the eye of the law includes it.[6] It is clear that neither incongruity can be increased or diminished by the formal or informal character of the process by which unity of possession is achieved. Still another solution was reached by Lord Coke, who declared that if the subsequent estate be

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13 Mouse's Case, 12 Rep. 63. See Respublica *v.* Sparhawk, *supra*.
14 See Abbott, Shipping, 14 ed., 753-757; Price *v.* Hartshorn, 44 N. Y. 94.
15 6 Bacon Abr., Trespass, 674. But *cf.* Gilbert *v.* Stone, Aleyn 35.
16 The Brig William Gray, 1 Paine 16.
17 See 3 HARV. L. REV. 189, 204; Terry, Principles of Anglo-American Law, § 425.

1 Challis, Real Property, 2 ed., 76.
2 The cases on the merger of estates held in different rights have generally involved either the coalescence in the same hand of an executor's term and a reversion in the owner's personal right, or of an estate in the right of a wife and an estate in the husband's own right.
3 See Lee's Case, 3 Leon. 110.
4 Bracebridge *v.* Cook, Plowd. 417.
5 Downing *v.* Seymour, Cro. Eliz. 911.
6 See 3 Preston, Conveyancing, 3 ed., 15 *et seq.*